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IN THE

Supreme Court of The United States

October Term, 1975

No. 75-1657

STATE OF NORTH CAROLINA,
Petitioner,

v.

FEDERAL POWER COMMISSION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE STATE OF WEST VIRGINIA, RESPONDENT

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BRIEF OF THE STATE OF WEST VIRGINIA, RESPONDENT

State of West Virginia, Respondent Intervenor, files this brief in response to the petition for writ of certiorari for review of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered March 24, 1976.

CITATIONS TO OPINIONS BELOW

The March 24, 1976 opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet published. It is set out in the appendix of the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 24, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 16 U.S.C. § 825*l*(b). Jurisdiction of the United States Court of

Appeals for the District of Columbia Circuit was founded upon 16 U.S.C. § 825*l*(b). Jurisdiction of the Federal Power Commission was founded up 16 U.S.C. § 797(e).

REASON FOR WEST VIRGINIA'S INTERVENTION BEFORE THE FEDERAL POWER COMMISSION

West Virginia was not aware of the proceedings before the Federal Power Commission regarding application by the Appalachian Power Company, Inc. for a license to build and operate the Blue Ridge Project in North Carolina and Virginia until the Examiner's Initial Decision of October 1, 1969 was brought to the attention of Attorney General Chauncey Browning of West Virginia by the Department of Natural Resources of West Virginia. An immediate and thorough review of the studies made by the Department of Natural Resources and proposed testimony of personnel of the Department of Natural Resources convinced the Attorney General that the Modified Blue Ridge Project, as recommended by Judge Levy's decision, would have adverse environmental effects upon the New River in West Virginia below Bluestone Dam.

In February, 1970, the Attorney General of West Virginia petitioned the Federal Power Commission to intervene out of time. The Commission granted West Virginia's petition.

REOPENED HEARINGS

After West Virginia's petition to intervene was granted, the Federal Power Commission ordered the record reopened to permit testimony on the effects of the Modified Blue Ridge Project upon the recreational aspects of the New River in West Virginia and upon

water quality aspects of the Kanawha River at Charleston, West Virginia, two hundred miles downstream from the project site.

West Virginia's objections to the Modified Blue Ridge Project were (1) that the record was defective and could be successfully attacked upon appeal from a Federal Power Commission decision to the United States Circuit Court of Appeals because almost one hundred miles of New River in West Virginia had not been studied and taken into account relative to the effects of the Blue Ridge Project upon that segment of the New River in West Virginia, (2) that Article 52 of the license would allow such high sustained flows from the project that New River in West Virginia below Bluestone Dam would be eliminated as one of the great recreational streams in West Virginia and in the eastern United States, and (3) that the storage of 650,000 acre-feet of water in the project for pollution dilution of Kanawha River in West Virginia was illegal and unnecessary. The high flows necessary from the project to effectively treat the polluted Kanawha River would have brought about the sacrifice of the New River in West Virginia.

Additional testimony was allowed by the Federal Power Commission in two areas of great concern: (1) recreation and (2) water quality. A hearing regarding the effects of the project on the recreational aspects of New River in West Virginia was held in Beckley, West Virginia, in July, 1970, and a hearing on the water quality aspects upon the Kanawha River at Charleston, West Virginia, was held in Washington in December, 1970. Testimony presented at those hearings established that the objections raised by West

Virginia to Judge Levy's Initial Decision were indeed meritorious.

On June 21, 1971, Judge Levy issued a Supplemental Initial Decision. This decision did not resolve West Virginia's objections to the project and West Virginia's Attorney General Browning filed exceptions thereto in August 1971.

GREENE COUNTY DECISIONS

While the case was pending before the Federal Power Commission for decision, the Court of Appeals for the Second Circuit held in *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412 (1972), that the National Environmental Policy Act requires that an environmental impact statement be prepared by the Federal Power Commission staff in advance of hearings and that such statement be subject to the full scrutiny of the hearing process. In October, 1972, the Supreme Court denied the Federal Power Commission's petition for a writ of certiorari. *Federal Power Commission v. Greene County Planning Board*, 409 U.S. 849.

Because of the *Greene County* decision, the Federal Power Commission, on November 2, 1972, reopened the proceedings again to permit the further examination of environmental issues and to implement the National Environmental Policy Act.

During the reopened proceedings, the Federal Power Commission staff filed its Draft Environmental Impact Statement in January, 1973, West Virginia filed its comments to Staff's Statement in April, 1973, followed by Staff's Final Environmental Impact Statement filed in June, 1973. West Virginia filed its Brief On

Reopened Proceedings to Implement the National Environmental Policy Act in September, 1973.

Three new issues developed during the reopened proceedings that were very important to West Virginia. Those issues were: (1) West Virginia requested low-flow augmentation for New River, (2) the Federal Power Commission staff recommended a reallocation of flood control storage in Bluestone Dam at Hinton, West Virginia, and (3) the Administrator of the Environmental Protection Agency issued a ruling regarding the use of water from the project for water quality purposes.

The Federal Power Commission staff recommended in its Final Environmental Impact Statement that 180,000 acre-feet of water be included in Blue Ridge for the enhancement of recreational purposes below Bluestone Dam. Testimony of personnel of the Department of Natural Resources on behalf of the State of West Virginia established that fishing and other recreational purposes would be considerably enhanced if the natural flows of the New River below Bluestone Dam in West Virginia were augmented up to 2500 cfs during the recreational summer months.

Therefore, the Attorney General of West Virginia, in his brief on behalf of West Virginia, requested that the natural flows of New River below Bluestone Dam be augmented up to 2500 cfs during the high recreational summer months.

Storage of 186,000 acre-feet in Blue Ridge for flood control storage reallocation at Bluestone Dam was proposed by the Federal Power Commission staff in its

Final Environmental Impact Statement. West Virginia strongly opposed this flood control reallocation because the water level at Bluestone Dam would have been raised 70 to 90 feet thereby eliminating most of the recreational facilities at Bluestone Dam and, further, because under the Flood Control Act of 1936 the Federal Power Commission does not have authority to reallocate flood control storage at Bluestone in the opinion of West Virginia.

The Federal Water Pollution Control Act, Section 102(b)(6), requires the Administrator of the Environmental Protection Agency to make a determination as to whether or not storage for regulation of stream flow for the purposes of water quality control should be included in the Blue Ridge Project. In April of 1973, the Administrator of EPA made that determination in the nevative. The State of West Virginia seized upon this decision to strengthen West Virginia's earlier position that water quality control storage should not be included in the Blue Ridge Project.

JUDGE'S THIRD DECISION

On January 23, 1974, Presiding Judge Levy issued his third decision denominated Additional Supplemental Initial Decision.

A review of Judge Levy's third decision disclosed Ridge Project had been resolved as requested by West that West Virginia's objections to the Modified Blue Virginia.

In addition, low-flow augmentation of the New River below Bluestone Dam had been recommended as requested by West Virginia.

Flood control reallocation at Bluestone Dam which had been requested by the Federal Power Commission staff and opposed by West Virginia had been eliminated.

Clearly there was no need for West Virginia to file exceptions to Judge Levy's third decision.

FPC GRANTS LICENSE

The Federal Power Commission on June 14, 1974 granted a license to Appalachian Power Company for the Modified Blue Ridge Project.

The license contains provisions which reflect Judge Levy's decision as it relates to West Virginia. Article 51 of the Opinion and Order provides West Virginia with the protection needed for New River and does not allow any water for pollution dilution at Charleston, West Virginia, in lieu of adequate treatment or other methods of controlling waste at the source. There is no requirement for reallocation of flood control storage at Bluestone Dam.

Article 51(b) provides for low-flow augmentation of New River up to 2500 cfs during the peak recreational months.

Your petitioner, State of North Carolina, appealed this decision to the United States Court of Appeals for the District of Columbia Circuit and that court upheld the decision of the Federal Power Commission by its order dated March 24, 1976.

CONCLUSION

The only issue raised by the State of North Carolina before the United States Court of Appeals for the District of Columbia Circuit that West Virginia had

developed before the Federal Power Commission is that of water storage for pollution dilution. West Virginia thinks it is clear that the license issued by the Federal Power Commission to Appalachian Power Company does not allow any water storage for that purpose.

The license issued by the Federal Power Commission meets all of West Virginia's objections favorable to West Virginia and, in addition, gives West Virginia low-flow augmentaton for New River below Bluestone Dam during peak recreational months.

West Virginia has prevented destruction of New River in West Virginia below Bluestone Dam and has gained for it low-flow augmentation for recreational purposes.

West Virginia had no real reason to petition for appeal to this Honorable Court from the Opinion and Order of the United States Court of Appeals for the District of Columbia Circuit. The State of West Virginia intervened in this proceeding to protect the interests of West Virginia as they might appear.

Respectfully submitted,
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